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Divorce and its Effect in Foreign Jurisdictions

William W. Kelley
Cornell Law School

THESIS.

DIVORCE AND ITS EFFECT IN FOREIGN JURISDICTIONS.

WILLIAM W. KELLEY.

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History Q.

The Mosaic law, as generally interpreted, allowed the husband to be the sole judge of the causes for which he might put away his wife; and this was equivalent to his divorcing her at his pleasure. Two opinions are held as to whether this liberty of divorce was intended by Christ and his teachings to be restricted to the single cause of adultry, or whether grounds were sufficient for such a putting away. Both of these positions are supported by able men who differ as to the meaning of the passages of scripture bearing on this subject.

It was ordained by Romulus that if a man put away his wife

wife except for adultery, or one of two or three other very grave offences, he forfeited his estate, one-half to her and one half to Cæsar. Though the husband divorced, except for grave misconduct on the part of the wife, was unknown until the sixth century of the city, and up to that time any man who turned his wife away, however serious the grounds, without the cognition of the family council was liable to penalties at the hands of the censors, yet the law maintained perfect freedom of divorce. The simplicity of the first five centuries of Rome and the disfavor in which divorces were held caused such a law to produce no evil. In the latter

part of the sixteenth century the family council was displaced as a divorce court by a court of its own named by the practor. This not only facilitated divorce but also rendered the idea of it familiar, so that in the classical period divorces were very common, and were lawful without any assignable cause. Divorce was as free as marriage and independent of any tribunal.

By the early English law, according to Blackstone, marriages ceased to be annulled only for canonical causes existing at the time of marriage. but by the act 20 and 21 Vict passed in 1857, adultry, cruelty and

desertion for two years are causes for divorce against husband or wife. This act also took the power of granting divorces from parliament when it had formerly been, and lodged it in the courts. Marriages may also be annulled for those causes for which annulment was formerly allowed. A distinction is to be observed between annulment and divorce, the former term applies to marriages that are void ab initio, as where the parties are within the prohibited degrees, or for impotency, and the court decrees a separation on those grounds.

In the earlier history of the United States, divorces were

required to be approved by the legislature in some states, while in others a special act of the legislature was required. By an act of Congress, approved July 30, 1886, the legislatures of the territories are prohibited from passing any special laws granting divorces; and a similar provision is found in the constitutions of all the states except Ala., Conn., Del., Ga., Kans., Me., Mass., Neb., R. I., and Vt. By the statutes of all the states, except South Carolina, which allows no divorce, the granting of them is provided for by the courts. Each state has control of its own divorce laws; and as a result we find but little uniformity

Causes.

on the subject. The following table shows the number of causes in each State for which a divorce may be granted.

No. of Causes.		
14	N.H.	1
11	Mo., Wash., Wyo.	3
10	Kans., La., Miss., Ohio, Pa., R.I., Tenn.	7
9	Ala., Ark., Del., Fla., Mass., Neb.	6
8	Ariz., Conn., Ind., Ga., Ill., Mont., Vt., W. Va.,	8
7	D.C., Ind., Ky., Me., Nev., Oregon, Utah.	7
6	Cal., Col., Dakota, Iowa, Mich., Tex., Minn., Wis.	8
5	Md., N. Mex., N.C.	4
1	N.Y.	1

compiled from Report of Com. of Labor, 1889.

In Mass. the court may, for any cause deemed sufficient, and when satisfied that the parties cannot longer live together decree a divorce.

Adultry is a cause in all the states, by husband or wife, except in Ky, N.C. Tex. In these states living in adultry with another woman by the husband is sufficient cause for the wife to procure a divorce; and a decree will be granted the husband against the wife in Ky., and N.C. for the commission of adultry by the wife, and in Tex. when the wife shall have been taken in adultry. Impotency or physical incapacity at time of marriage is a cause in all but eleven states. Cruelty, actual violence or apprehension

thereof, or inhuman treatment is a cause in all but six; failure or neglect of husband to provide for wife cause in twenty-one; habitual drunkenness cause in all but nine; conviction of felony or infamous crime, cause in all but seven. When one party has procured a divorce in another state the other party will be granted one in Ind., Mich., and Ohio.

Defenses:

Having briefly touched upon the causes for which divorces are granted, we pass to notice the general defenses to the action. The first one to receive our attention is connivance. It has been defined as "the corrupt consenting of a married party to conduct in the other, of which complaint is afterward made". It is a

bar to an action for divorce because no injury was received. Bishop says, "That the connivance may be a passive permitting of the adultry & other misconduct, as well as an active procurement of its commission. It is a corrupt consenting"

Bishop on M. & D., Vol 2, § 6

From Greenleaf we learn that it is not always necessary to prove that the husband has connived at the particular acts of adultry charged; "for if he suffers his wife to live as a prostitute, and criminal intercourse with a third person ensue he can have no action. It is damnum absque injuria."

Greenleaf on Evid. Vol 2, § 51

We are to observe that it is
an assent of the mind to the act
or acts; but a knowledge of such
acts followed by a prohibition of
the parties does not always warrant
a connivance. It seems to be gen-
erally held that while circum-
stantial evidence, as well as direct
proof, may be given to establish
connivance of the wife, yet con-
nivance is not always inferred from
the facts that would be ample proof
against the husband. This is based
upon the ground that the husband
is by law the guardian of his
wife's morals, and therefore his
want of attention to her selection
of associates and to her conduct
in other respects may be evidence
against him.

This doctrine has been carried

to the extreme in some cases. In an Iowa case it was held that it was not a sufficient defense to the husband in an action brought by his wife that she knew at the time of his criminal acts and without any connivance on her part gave opportunity for intercourse between the husband and his paramour

Cochran v Cochran (35 Ia. 478)

"If the husband receives a caution concerning his wife's conduct, or if he sees what a reasonable man could not see without alarm, or if he has himself induced her before marriage, whereby he is put upon his guard respecting her weakness, he is called upon to exercise a peculiar vigilance and care over her: and if he does

what a reasonable man
would not permit; and makes no
effort to avert the danger, he must
be supposed to see and mean the
consequences".

Bishop Vol 2, §21

Yet this rule should be applied
with due allowance for defective
perception and overweening confidence
in the wife.

Culpable negligence of the husband,
or delay in not bringing his action
promptly after he has knowledge
of the wife's adultry may amount
to connivance; which by the English
doctrine, at least, the wife is not
bound to take prompt notice
of the husband's infidelity. Some
cases have gone so far as to hold
that a forbearance on her part
with the hope of his return to

her society would not be a bar to her remedy.

Kirkwall v Kirkwall. 2 Hag. Con. 277.

We find no American case going to this extreme, nor are we sure this principle is generally recognized here; but the cases make a distinction between delay on the part of the husband and delay of the wife.

Condonation:

Condonation, or the forgiveness of by a husband or wife of a matrimonial offence which the other has committed, is a defense in most countries. In connivance no injury is done to the complaining party; in condonation the injury is forgiven. It has been defined

by one, as, "a blotting out of the offense imputed, so as to restore the offending party to the same position he or she occupied before the offense was committed; on the condition subsequent, that ever afterward the party in fault shall be treated by the other with conjugal kindness".
This forgiveness may be expressed in words or may be implied by acts done. In either case such forgiveness must be shown by express proof or by the voluntary cohabitation of the parties with knowledge of the fact.

Code Civ. Proc. § 1758

a distinction is made between condonation of adultery and

of other offenses, some cases holding that where the wife husband has been guilty of cruel and inhuman conduct, and the wife has lived with him till the decree was rendered there was no condonation.

Lesterhen v Lesterhen 14 N.P.R.(n.s.) 333

allen J. says: "That the whole ground of condonation goes upon the basis that there is, in law, no such thing as an unpardonable offence against the marriage relation. Even adultry is not universally found to be unpardonable in actual experience, and it should not be deemed so in law. It is an offence which may, at the option of the injured party, serve as the ground for a divorce; or it may be overlooked and forgiven. Various motives may

prompt the injured party to endure the sense of wrong, and to condone the offense. But whatever the motive, if one is not under stress of circumstances but is free to act in either way, and having a full understanding of all the facts deliberately and fully elects to condone the offense and to take the real or supposed advantages which are expected to arise therefrom, it is better to hold, that, as a general rule, the door for legal complaint has closed and the mouth of the injured party ought thereafter to be sealed as to that particular offense, unless a similar one is repeated in the future. But forgiveness of one act is not forgiveness of other acts of which the forgiving party

has neither knowledge nor reasonable grounds of belief".

"Cumming v Cumming, 135 Mass. 386

Whether the condonation in any particular case is to be confined to one or more acts or to include all past offenses is to be decided by the language and conduct of the parties in view of the facts then known or reasonably suggested.

In England it is held that to revive condoned cruelty it is not necessary that an injury showed not be of the same nature; but that cruelty, desertion or other improper conduct of the husband towards his wife is sufficient to revive such condonation. This is not the doctrine in New York, at least. Here to revive a condoned ad-

guilty so as to entitle the injured party to a divorce the subsequent misconduct must be of the same character.
In Johnson v Johnson (4 Paige 459) it was held that forgiveness is not a conditional contract with us as it is in England. (This is also settled by sub. 2 of section 1758 of the Code of Civ. Proc.) The case of Hoffman v Hoffman, (7 Paige 60) is sometimes cited as holding that conviction for felony will revive a condoned adultery; but upon an examination of the case we find this not even hinted at. The fact of the injured party saying that an act of adultery, once condoned, will never be the ground of a divorce in his favor as another act of adultery would be necessary

to revive the former act, and the latter would be sufficient cause.

Condonation is always inferred or less conclusive evidence than connivance as the latter always savors of criminality which the former may be meritorious-

recrimination.

The next defense we shall consider is recrimination. It rests on the ground of the complainants being in like guilt as the one of whom he complains. One has defined it as being the defense which consists in showing that the complainant has broken, either completely, or in part, the same matrimonial chain of whose breach by

the other party, whether in the same or in other lines, he complains." One cannot complain of a breach of a contract which he has violated. He may not complain of an injury when he is guilty of the same offence. This defence is but an illustration of that general principle running through the whole field of jurisprudence that he who comes into court must do so with clean hands.

The English and American courts are clear on the point that where both parties are guilty of adultry the action for divorce is barred. This is true no matter which party first committed the offense; and even though the recriminatory act followed a

separation which took place on the discovery of the offence relied upon as a cause for the divorce asked. It is also generally held in both countries that a single act of adultry is sufficient in bar, whatever the extent of guilt on the other side

Will an Offence of a different nature from the one for which divorce is asked be a bar?

By the Eccl. Statute, 20 Vict. the Court is not bound to decree a divorce on the ground of adultry if it find that the petitioner has been guilty of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultry complained of, and without reason-

able excuse, or of such wilful neglect or misconduct as has conduced to the adultery. What may be a bar in England is therefore largely within the discretion of the Court. This differs from the American doctrine which is supported by the cases - with few exceptions. We may state as a general proposition that it is necessary and sufficient for the defendant to show in recrimination an act of the plaintiff that the law has made a cause for a divorce, whether it is of the same sort as the one for which divorce is asked or not. In Vaughn v Vaughn, (2 Mv. 52) the Court said: It cannot with reference to the rights of the injured party be said that adultery is a

more heinous offence, or one of greater moral turpitude than others enumerated in the act, for the effect of each is the same, as may generally entitle the party injured to a divorce. The whole act contemplates the innocence of the party obtaining a divorce. Which party has the right to appeal to the court to set aside the marriage contract when both parties have been guilty of a breach thereof?"

Delay. The last defense we have to consider is delay. It has been incidentally touched upon in connection with condonation. It is of itself a defense. By the English statute before referred to, it is in the discretion of the court to grant a divorce or

not in case of unreasonable delay. In most of the States the time within which the action must be commenced after discovery of the offense charged is fixed by statute. Where there is no statutory provisions, the principle is recognized that such delay on the part of the husband as would bar his action would not always be such a delay as would bar an action by the wife.

In Newyork if the action is not brought within five years after the discovery of adultry the delay is a bar.

Sub. 3 § 1758 Code of Civ. Proc.

Foreign Divorce.

We deem it necessary for a further consideration of our subject to ask what it is that is annulled or dissolved by a divorce. In other words what is marriage?

Blackstone says it is in law considered in no other light than a civil contract. Story says that the common law of England and America considers it only as a civil contract, while he personally deems it something more than a mere contract - an institution of society with peculiarities different from those belonging to ordinary contracts. The tendency now is to hold it as more than a contract, as evidenced by such ex-

pressions as the following: "It is more than a contract, is indissoluable by the parties, subsists during the lives of them becomes inseparable by act of God." "It is of greater moment to the state than to the contracting parties." "It is the parent of society and not the child." "a contract that the parties cannot rescind nor modify only by permission of the state and for causes of which it approves".

We feel safe in saying that whatever else marriage may be, it has rights or status clothing the parties with relations entirely new as to each other and the world, and feel that we speak the doctrine of the present time. This status is carried by the parties wherever they may go.

It is an elementary principle that a state may adjudge and declare the status of its own citizens, and therefore each state may dissolve the marriage relation of its own citizens when the marriage was celebrated in that state and the offense was committed therein. Personally I hesitate to subscribe to the doctrine that a state may annul a marriage made in it or in another state for a cause that would not be grounds for a divorce in the state where the offense was committed. This does not seem to be the rule however, nor hardly the exception. N.H., Pa., and La. are inclined to hold that the cause must have arisen within the state.

Effect of Foreign Divorce.

If plaintiff have his domicile in one state he may bring his action

there and have his status fixed by the court; and if defendant be a non-resident, yet comes into court or the court gets jurisdiction of her, the decree will be binding on her. In other words, if the court have jurisdiction of the subject matter and of the parties the decree will be binding upon both, whether in that or some other state. It is not material to the question of jurisdiction in what county or under what system of divorce laws the marriage was entered into. This is put upon the ground that while the contracting parties may retain the inviolability of the status by remaining in the state, upon a removal to a foreign jurisdiction, the status undergoes a change, inasmuch as the statutory requirements which characterize the status in one state cannot be transferred

to another state even upon a bona fide change of domicile, for upon such a change the status of the new domicile attaches and the old is lost.

The constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of any other state is limited to cases where the courts have jurisdiction of the subject matter and the parties, and there has been no fraud used. The conflict on the effect of a divorce in one state, when rendered in another, is caused largely, if not wholly, by a difference in what is held necessary to constitute such jurisdiction. No fraud no claim. made that one state may not decree a divorce binding on both parties in any state under the conditions above

named. This is not in harmony with the English doctrine that a foreign court could not dissolve an English marriage. This doctrine is now questioned seriously, some English judges holding that it was never the accepted law.

Harvey v Farnie, (5 Law Rpts. Appeals 43)

While there has been a great deal said and written to the effect that the domicile of the husband is always that of the wife, and that it is sufficient for the court to have jurisdiction of one party, it is no longer of any account as against the absent party.

Constructive notice to non-resident defendant is held by many states to be sufficient to give the court jurisdiction of defendant and to bind him by the decree. It is

a principle of interstate law that each State has the right to judge of the status of its own citizens; but can exercise no jurisdiction outside of its own borders. But when an applicant comes into court he brings his status with him, and this gives the court jurisdiction of the subject matter, which jurisdiction could not be strengthened in any wise by the presence of the defendant. This is universally held in actions in rem as to the property affected by the decree, and is also the law in most states in divorce actions, whether the action for divorce be considered as an action in rem or not.

The case of Cheever v Wilson, (9 Wal. 108) is often quoted as holding this doctrine; but we believe it has no bearing on the question

is the defendant appeared and answered therein. Another case often cited to sustain the same proposition is Pennoyer v Neff, 95 U.S. 714. This related only to property purchased at a sale under execution rendered upon service of summons by publication. It holds that to warrant a judgment in personam, there must be personal service of process; and that a state may authorize judicial proceedings to determine the status of one of its own citizens towards a non-resident which will be binding within the state without personal service of process or appearance. But it does not hold that a judgment thus obtained may do more than establish the status of the parties to it, within the state in which the judgment is rendered.

The Federal rulings therefore do not decide the correctness of this doctrine. The New York rulings are squarely opposed to this proposition. The quote from an opinion by Folger, J. "We must and do concede, that a state may adjudge the status of its citizens towards a non-resident; and may authorize to that end such judicial proceedings as it sees fit; and that other states must acquiesce, so long as the judgment operates, or is kept within its own confines. But that judgment cannot push its effect over the borders of another state to the subversion of its laws and the defeat of its policy; nor seek, across its bounds, the person of one of its citizens, and fix upon him a status against his will, without his consent

and in hostility to the laws of the sovereignty of his allegiance. There is no principle of comity which demands that another sovereignty shall permit the status of its citizens to be affected thereby, when contrary to its own public policy, or its standard of public morals. Has not the state, in which the other party named in the proceedings is domiciled, also the equal right to determine his status, as thus affected, and to declare by law what may change it, and what shall not change it? If one state shall have its policy and enforce it on the subject of marriage and divorce, another may."

People v Baker, (76 Ky. 78)

In the case just cited, the husband living in New York, against whom his wife had obtained a divorce in Ohio without personal service of process was held guilty of bigamy for remarrying in New York during the life time of his first wife, but after her getting the divorce.

In Me., Del., and Mass. it is provided by statute that when any inhabitant of the state shall go into any other jurisdiction to obtain a divorce for any cause occurring within the state, or for a cause that would not authorize a divorce by the laws of the state, a divorce so obtained shall be void and of no effect in the state first mentioned.

In Indiana it is declared by

statute that a divorce decreed in any other state by a court having jurisdiction shall have full effect in the state first named.

These four states are the only ones it seems that have any statutes on this question point.

It may be stated as a general proposition, with the exceptions mentioned and possibly a few others, that a divorce of one party is a divorce of both; and if the decree of a court having jurisdiction is to make him a single man then, its effect and is equally to the same extent to make him a single man in the other states.

Length of residence:

All the states and territories except Del., Geo. and La. have some provision relative to the length of time of residence required before bringing the action. One year is the term fixed in many states. Mass. requires the longest time - five years; while N. Dak. leads all others by requiring only three months.

Remarriage after divorce:

In the following nine states and territories marriage after divorce is permitted without limitation: Ariz., Ark., Cal., Conn., Idaho, Ky., N.C. R.I., Tex. In many states the guilty one is not allowed to marry during the life of the innocent party where the offense charged was divorce adultry, without the consent of the court. In others neither party may marry

for a certain period after divorce. In New York the innocent party may remarry; but no defendant found guilty of adultry shall marry again un=til the death of the complainant, unless the court which rendered the divorce shall grant permission to do so upon satisfactory proof that the complainant has remar=ried, that five years have elapsed since divorce was decreed, and that conduct of defendant since divorce has been uniformly good.

Laws of 1879 pp. 231
§ 1761 Code Civ. Proc. which is an amendment of first ref. as to whether this changes the law see Rick v Rick, 8 Abb. N. C. 400.

We have treated divorce simply as a separation of the parties, wherein no property rights, demands of alimony and questions concerning the charge of children were involved. When these are in question, the action partakes somewhat of an action in personam, and as such, can have no effect outside of the state where the divorce is rendered.

But this field we do not purpose to enter, as it is beyond the scope of our intended examination, neither shall we even touch upon divorce a mensa et thoro.

Conclusion.

This may not be the place to discuss our subject in its moral aspect, or even as a matter of public policy; yet we cannot leave it without adding our voice to that of the many who are crying for a reform. We realize the difficulties in the way of such reform however. The different views of marriage and what should constitute just grounds for its dissolution would, we think, prevent the adoption of a constitutional amendment or a uniform law in any way but it might not be impossible to get the states to agree to a few rules that would not affect the bona fide residents of each state and yet would be of great benefit.

Two of these rules should be;

1- Every action for a divorce must be brought in the jurisdiction in which the injured party resided at the time of the injury or in the actual domicile of the other party at the commencement of the action.

2- No divorce shall be granted except for a wrong that would have been sufficient cause for a divorce where such wrong was committed.

Finis.

W. H. Kelley.